No. 17-1094

# In the Supreme Court of the United States

NUTRACEUTICAL CORP.,

*Petitioner*,

v.

TROY LAMBERT,

*Respondent*.

*On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Federal Rule of Civil Procedure 23(f) establishes a 14-day deadline to petition for permission to appeal an order granting or denying class-action certification. On numerous occasions, this Court left undecided whether mandatory claim-processing rules, like Rule 23(f), are subject to equitable exceptions, because the issue was not preserved. *See, e.g.*, *Hamer v. Neighborhood Hous. Serv. of Chi.*, 138 S. Ct. 13, 18 n.3, 22 (2017). That obstacle is not present here.

The question presented is: did the Ninth Circuit err by holding that equitable exceptions apply to all mandatory claim-processing rules, such that Respondent's failure to petition for permission to appeal or file a motion for reconsideration before the Rule 23(f) deadline was excusable despite Petitioner's timely objection?

As the Ninth Circuit acknowledged below, its decision conflicts with other United States Circuit Courts of Appeals that have considered this issue (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits).

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner is Nutraceutical Corporation ("Nutraceutical"). In the proceedings below, Nutraceutical was the defendant-appellee. The parent corporation of Nutraceutical is Nutraceutical International Corporation. The parent corporation of Nutraceutical International Corporation is Nutrition Parent, LLC. No publicly held company owns 10% or more of Nutraceutical's stock.

The Respondent is Troy Lambert. In the proceedings below, Lambert was the plaintiff-appellant.

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## BRIEF FOR PETITIONER

## OPINIONS BELOW

The Ninth Circuit's opinion is reported at 870 F.3d 1170, and reprinted at Petitioner's Appendix 1. The District Court's order granting Nutraceutical's motion to decertify the class is not published in the *Federal Supplement*, but it is available at 2015 WL 12655388, and reprinted at Petitioner's Appendix 52. The District Court's order denying Respondent Lambert's motion for reconsideration is not published in the *Federal Supplement*, but it is available at 2015 WL 12655392 and reprinted at Petitioner's Appendix 27. The Ninth Circuit's order denying Nutraceutical's petition for rehearing en banc is reprinted at Petitioner's Appendix 67.

## JURISDICTION

The Ninth Circuit entered judgment in this case on September 15, 2017. Pet. App. 1. On November 3, 2017, the Ninth Circuit denied Nutraceutical's petition for rehearing en banc. Pet. App. 67. This Court granted Nutraceutical's timely filed petition for a writ of certiorari on June 25, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## FEDERAL RULES INVOLVED

Federal Rule of Civil Procedure 23(f) provides:

> (f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.

> An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.[1]

Federal Rule of Appellate Procedure 5(a) provides:

> (a) Petition for Permission to Appeal.
>
> > (1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.
> >
> > (2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.
> >
> > (3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

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[1] Prior to December 1, 2009, Rule 23(f) established a deadline of ten days rather than fourteen.

Federal Rule of Appellate Procedure 26(b)(1) provides:

> (b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
>
> (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or
>
> (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

Federal Rule of Appellate Procedure 2 provides:

> On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

## STATEMENT OF THE CASE

Lambert filed the underlying class action against Nutraceutical on March 14, 2013, alleging violations of California's false advertising and unfair competition laws arising out of Nutraceutical's sale of a dietary supplement. The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(d)(2).

The District Court initially certified the class on June 19, 2014. Following the close of discovery, on February 20, 2015, the District Court granted Nutraceutical's motion to decertify the class because Lambert failed to demonstrate both predominance, *see* Fed. R. Civ. P. 23(b)(3), and a measure of damages that did not capture non-restitutionary damages in compliance with California law. Pet. App. 40, 60–65.

Pursuant to the 14-day deadline in Federal Rule of Civil Procedure 23(f), Lambert's deadline to petition for permission to appeal the District Court's decertification order expired on March 6, 2015. Although nothing prevented Lambert from doing so, he did not petition for permission to appeal by the March 6 deadline.

Instead, at a status conference on March 2, 2015, Lambert requested permission to file a "renewed motion for class certification." Pet. App. 71. The District Court denied Lambert's request. The District Court acknowledged, however, that Lambert could file a motion for reconsideration pursuant to the Central District of California's local rules. *Id.* at 73–76. In fact, Lambert did not need the District Court's permission to file a motion for reconsideration—he could have filed the motion for reconsideration at any time under the applicable local rules. *See* C.D. Cal.

L.R. 7–18. After discussing the case schedule, the District Court set a March 12, 2015 deadline for Lambert to file his motion for reconsideration. Pet. App. 73–76.

During the status conference, Lambert did not mention that he was contemplating petitioning for permission to appeal under Rule 23(f). *Id.* at 68–77. There is no evidence in the record that Lambert even considered filing a Rule 23(f) petition before his motion for reconsideration was denied. Consequently, when the District Court set a March 12 deadline on Lambert's motion for reconsideration, the Rule 23(f) deadline had not been raised and was not at issue.

Ultimately, Lambert filed his motion for reconsideration on March 12, 2015. The District Court denied the motion on June 24, 2015. Pet. App. 27.

On July 8, 2015, Lambert finally filed a Rule 23(f) petition for permission to appeal with the Ninth Circuit. JA17. The petition was filed more than four months after the deadline set by Rule 23(f) expired.

On July 20, 2015, Nutraceutical timely filed its opposition to Lambert's Rule 23(f) petition. JA39. Among other arguments, Nutraceutical objected to Lambert's Rule 23(f) petition as untimely. JA41 ("The petition at issue here is time-barred and should be denied for that reason alone.").

On September 16, 2015, a Ninth Circuit motions panel conditionally granted Lambert's petition and instructed the parties "[i]n addition to all other issues they wish to raise in their briefs in the appeal, to . . . address the timeliness of this petition." *Lambert v.*

*Nutraceutical Corp.*, 870 F.3d 1170, 1175 (9th Cir. 2017) (alterations omitted).

The case was then assigned to a Ninth Circuit merits panel. In its answering brief, Nutraceutical again objected to Lambert's Rule 23(f) petition as untimely. JA103 ("The Rule 23(f) petition underlying this appeal is time-barred by the Federal Rules of Civil Procedure, and the appeal should be denied for that reason alone.").

The Ninth Circuit heard oral argument on March 9, 2017. On September 15, 2017, the Ninth Circuit issued an opinion holding that Lambert's Rule 23(f) petition was timely. Reaching the merits of the appeal, the Ninth Circuit reversed the District Court's decertification order and remanded the case.

The Ninth Circuit conceded that "[u]nder the plain text of Rule 23(f), Lambert's petition would be untimely because it was not filed within fourteen days of the district court's initial order decertifying the class." *Lambert*, 870 F.3d at 1176. Nevertheless, the court held that equitable exceptions applied. The Ninth Circuit reached that decision in three steps:

*First*, the Ninth Circuit held that Rule 23(f) is a non-jurisdictional, claim-processing rule. *Id.* at 1177. *Second*, the Ninth Circuit held that a motion for reconsideration filed *within* Rule 23(f)'s 14-day deadline will toll the deadline. *Id.* at 1177–78. The Ninth Circuit recognized, however, that Lambert's motion for reconsideration did not satisfy this exception because it was filed after the Rule 23(f) deadline had expired. *Id.* at 1178. *Third*, the Ninth Circuit held that equitable exceptions also apply. Citing *Bowles v.*

*Russel*, 551 U.S. 205, 211–14 (2007),[2] the Ninth Circuit concluded that "[w]hen deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations." *Lambert*, 870 F.3d at 1177.

The Ninth Circuit went on to adopt broad equitable exceptions to the Rule 23(f) deadline. The court held that the availability of equitable exceptions in each case depends on "equitable factors such as whether the litigant 'pursued his rights diligently,'" "whether external circumstances, such as a deadline imposed by the district court, affected the litigant," and "whether [the] litigant took some other action similar to filing a motion for reconsideration within the 14-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration and providing the basis for such action." *Id.* at 1178 (footnote and citation omitted).

Applying those factors, the Ninth Circuit held that Lambert equitably tolled the Rule 23(f) deadline because he "informed the court orally of his intention to seek reconsideration of the decertification order and the basis for his intended filing within 14 days of the decertification order and otherwise acted diligently, and because the district court set the deadline for filing

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[2] The Ninth Circuit erroneously relied on *Bowles*. That case did not hold that equitable exceptions apply to claim-processing rules. Rather, *Bowles* held that equitable exceptions do not apply to jurisdictional rules. *Bowles*, 551 U.S. at 211–14. Contrary to the Ninth Circuit's decision, and as explained further below, this Court has consistently recognized under circumstances nearly identical to this case that the plain language of claim-processing rules can preclude equitable exceptions.

a motion for reconsideration with which Lambert complied." *Id.* at 1179.

## SUMMARY OF ARGUMENT

Mandatory claim-processing rules are "unalterable" if a party "properly raise[s] them." *Eberhart v. United States*, 546 U.S. 12, 15, 19 (2005) (citation omitted); *see also Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017). There is no dispute here that Rule 23(f)'s 14-day deadline to petition for permission to appeal an order granting or denying class certification is a mandatory claim-processing rule. Nor is there any dispute that Nutraceutical timely objected when Lambert filed an untimely Rule 23(f) petition. JA41. Accordingly, the Ninth Circuit had a "duty to dismiss the appeal." *Eberhart*, 546 U.S. at 18.

Rather than dismiss the appeal, the Ninth Circuit applied a broad and unprecedented equitable exception to permit it. Citing *Bowles*, 551 U.S. at 211–14, the Ninth Circuit assumed that all claim-processing rules—despite their mandatory and unalterable nature—are subject to equitable exceptions. *Lambert*, 870 F.3d at 1177 ("When deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations.").

*Bowles* did not reach that conclusion. Nor has any other decision of this Court. To the contrary, this Court's precedent demonstrates that the plain language set forth in mandatory claim-processing rules can preclude equitable exceptions. For example, this Court has repeatedly recognized that mandatory claim-processing rules written in "emphatic form" are

unsusceptible to equitable exceptions. *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004) (collecting cases).

*Carlisle v. United States*, 517 U.S. 416 (1996) and *United States v. Robinson*, 361 U.S. 220 (1960) demonstrate this point. In those cases, this Court held that Federal Rule of Criminal Procedure ("Criminal Rule") 45(b) precluded equitable exceptions to claim-processing deadlines. At the time, Criminal Rule 45(b) allowed courts to extend most deadlines for "excusable neglect," but it expressly prohibited extensions of the deadlines at issue in *Carlisle* and *Robinson*. Finding that "[t]here is simply no room in the text" of Criminal Rule 45(b) for equitable exceptions, the *Carlisle* court held that Criminal Rule 45(b) barred an extension even where "the defendant was legally innocent" or the late filing was a result of "attorney error." 517 U.S. at 421, 419. Likewise, the *Robinson* court held that Criminal Rule 45(b) precluded an extension for "excusable neglect." 361 U.S. at 221–22 n.1, 230.

Just like Criminal Rule 45(b), the rules governing the time to file a Rule 23(f) petition create a strict and unyielding deadline that precludes equitable exceptions. Rule 23(f) requires a petition to be filed within 14 days of a district court's order, and Federal Rule of Appellate Procedure ("Appellate Rule") 5(a)(2) makes clear that the petition "must" be filed within that time.

Moreover, Appellate Rule 26(b) expressly prohibits courts from extending the Rule 23(f) deadline. It provides that courts may extend most deadlines "[f]or good cause," however a "court *may not* extend the time to file . . . *a petition for permission to appeal*." Fed. R. App. P. 26(b) (emphasis added). Appellate Rule 26(b)

is therefore nearly identical to Criminal Rule 45(b), which *Carlisle* and *Robinson* applied to preclude equitable exceptions to the claim-processing rules at issue in those cases.

Appellate Rule 2 also prohibits courts of appeals from suspending Appellate Rule 26(b)'s limitations. Fed. R. App. P. 2 ("[A] court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules . . . except as otherwise provided in Rule 26(b)."). It is difficult to imagine more "emphatic" language than the combined textual force of Rule 23(f) and Appellate Rules 5(a)(2), 26(b), and 2.

In light of the above, every other Court of Appeals to consider this issue has refused to recognize the kind of exception to the Rule 23(f) deadline that the Ninth Circuit created. *See, e.g.*, *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 193–94 & nn.5–6 (3d Cir. 2008); *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004) ("This court cannot disregard the plain meaning of [the] provisions [found in Rule 26(b)(1)]." (alterations in original) (citations omitted)); *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal.").

The Ninth Circuit's failure to do the same requires reversal. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) ("[F]ederal courts have no more discretion to disregard the [federal rules] than they do to disregard constitutional or statutory provisions."); *see also Carlisle*, 517 U.S. at 430 (stating that courts may not "ignore the mandate" of the federal rules "in order to obtain 'optimal' policy results").

While the Ninth Circuit's violation of the foregoing federal rules, by itself, requires reversal, there are numerous other reasons why the decision below is erroneous and should be reversed:

*First*, the Ninth Circuit's adoption of broad equitable exceptions is inconsistent with the very purpose behind Rule 23(f): to reduce the delay, disruption, and waste of judicial resources caused by interlocutory appeals by establishing a deliberately short 14-day filing window. *See* Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment ("The [14]-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings."); *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999) ("[T]o ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of review is deliberately small."). The Ninth Circuit's decision undermined that goal by applying broad equitable exceptions.

*Second*, the Ninth Circuit created considerable uncertainty in the law as to the timeliness of future Rule 23(f) petitions by replacing a simple, bright-line rule with an impractical standard. Under the Ninth Circuit's rule, appellate courts will need to consider "whether a litigant took some other action similar to filing a motion for reconsideration within the 14-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration." *Lambert*, 870 F. 3d at 1178. As explained herein, this vague standard is difficult to apply, unpredictable, and unnecessary.

*Third*, there is no substantial need for equitable exceptions in this context. A litigant who misses the Rule 23(f) deadline does not suffer any uniquely harsh consequences because class-certification decisions remain appealable following final judgment. *See* 28 U.S.C. § 1291. Filing a Rule 23(f) petition is also not an inherently difficult or complicated process. And regardless, parties in class-action proceedings are typically represented by competent counsel who are engaged in the litigation, receive notice of a district court's order on class certification, and can marshal their arguments to file a Rule 23(f) petition within 14 days.

Even if *some* equitable exceptions could apply to the Rule 23(f) deadline, the decision below must be reversed because the exceptions the Ninth Circuit created are inconsistent with the limits this Court has imposed. This Court's precedent is clear that equitable exceptions apply only "where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control," *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016), or where the litigant has relied on a "specific assurance" from a court that he can initiate an appeal at a later date, *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989).

The broad equitable exceptions the Ninth Circuit adopted contain no similar requirement. In this case, nothing prevented Lambert from filing a timely Rule 23(f) petition. Nor did the District Court represent that Lambert could petition to appeal the decertification order at a later date. Lambert simply failed to follow the applicable rules. His failure does

not even qualify as "excusable neglect," which this Court has held is not sufficient to excuse an untimely filing. *Menominee Indian Tribe*, 136 S. Ct. at 757.

Finally, to the extent Lambert argues that his motion for reconsideration restarted the Rule 23(f) deadline, he is incorrect because there is no dispute that his motion was filed *after* the Rule 23(f) deadline had passed. The motion was therefore untimely under both this Court's precedent and that of every Court of Appeals to consider the issue. *See United States v. Healy*, 376 U.S. 75, 77–78 (1964) ("[A] timely petition for rehearing by the Government filed *within the permissible time for appeal* renders the judgment not final for purposes of appeal until the court disposes of the petition." (emphasis added)); *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) ("[T]he courts of appeal uniformly require that a motion to reconsider be filed within [14] days if it is going to toll the . . . period within which to seek permission to appeal.").

## ARGUMENT

### I. CLAIM-PROCESSING RULES LIKE RULE 23(f) ARE MANDATORY AND MUST BE ENFORCED WHEN PROPERLY INVOKED

It is undisputed that Nutraceutical objected to Lambert's Rule 23(f) petition as untimely and maintained that objection throughout the Ninth Circuit proceedings. JA41, 103. As explained below, the Ninth Circuit had a "duty to dismiss the appeal" under these circumstances. *Eberhart*, 546 U.S. at 18; *see also id.* ("[W]hen the Government objected to a filing [as] untimely under Rule 37, the court's duty to dismiss the appeal was mandatory."); *Manrique*, 137 S. Ct. at 1272.

Recently, this Court has taken steps to clarify the difference between jurisdictional and mandatory claim-processing rules. As this Court explained in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13, 16–17 (2017), "a provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time," while "a time limit prescribed only in a court-made rule . . . is, instead, a mandatory claim-processing rule."

The distinction matters because failure to comply with a jurisdictional deadline "deprives a court of adjudicatory authority over the case, necessitating dismissal." *Id.* at 17. A jurisdictional defect cannot be waived or forfeited, is not subject to equitable exceptions, and the court has a duty to raise it *sua sponte* at any time. *Id.*; *see also Bowles*, 551 U.S. at 214–15. As a result, jurisdictional defects can cause harsh consequences. *See Henderson v. Shinseki*, 562

U.S. 428, 435 (2011) ("[M]any months of work on the part of the attorneys and the court may be wasted.").

It does not follow, however, that mandatory claim-processing rules lack all of the attributes of a jurisdictional rule. *See Gutierrez*, 523 F.3d at 198 ("Although the time limit in Rule 23(f) is claims-processing rather than jurisdictional, it is clearly a strict and inflexible time limit."); Scott Dodson, *Mandatory Rules*, 61 Stan. L. Rev. 1, 3–6 (2008).

The purpose of a claim-processing rule is "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 562 U.S. at 435. That purpose is best served when a rule is applied consistently and strictly according to its text.

This Court has therefore held that if a claim-processing rule is timely raised, the rule is "unalterable," and the court's duty to enforce it is "mandatory." *Manrique*, 137 S. Ct. at 1271; *Hamer*, 138 S. Ct. at 17 ("If properly invoked, mandatory claim-processing rules must be enforced."); *Kontrick*, 540 U.S. at 456 (explaining that claim-processing rules are "unalterable on a party's application"). This approach minimizes the harsh consequences of a jurisdictional rule—*e.g.*, dismissal for lack of subject matter jurisdiction after significant litigation activity has taken place—while otherwise promoting efficiencies and finality by encouraging parties to strictly follow the federal rules.

For example, this Court held in *Eberhart* that Criminal Rule 33(b)(2), which establishes the deadline to file a motion for a new trial for any reason other

than newly discovered evidence, is a claim-processing rule, and that such rules are "unalterable on a party's application." 546 U.S. at 15 (quoting *Kontrick*, 540 U.S. at 456). In other words, "[t]hese claim-processing rules . . . assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Id.* at 19.

This Court reaffirmed *Eberhart*'s holding in *Manrique* and held that a rule requiring a party to file a notice of appeal of an amended judgment is "at least a mandatory claim-processing rule." 137 S. Ct. at 1271. Because the government had raised the petitioner's failure to comply with this rule, this Court held that the lower "court's duty to dismiss the appeal was ***mandatory***." *Id.* (emphasis added).

## II. THE NINTH CIRCUIT ERRONEOUSLY ADOPTED EQUITABLE EXCEPTIONS TO THE RULE 23(f) DEADLINE

Despite the above, the Ninth Circuit did not dismiss Lambert's untimely Rule 23(f) petition. Instead, the Ninth Circuit held that Rule 23(f), and all other claim-processing rules, are subject to judge-made equitable exceptions. *Lambert*, 870 F.3d at 1177 ("When deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations."). For the reasons herein, the Ninth Circuit's holding is inconsistent with this Court's long-standing precedent and contravenes the very purpose of an interlocutory appeal deadline.

### A. CLAIM-PROCESSING RULES CAN PRECLUDE EQUITABLE EXCEPTIONS

Although this Court has "reserved" whether claim-processing rules are subject to equitable exceptions, *Hamer*, 138 S. Ct. at 18 n.3, its longstanding precedent demonstrates that at least some are not. This Court has consistently recognized that the plain language of claim-processing rules can preclude equitable exceptions. That is particularly true where, as here, the rule is written in "emphatic" form. *Kontrick*, 540 U.S. at 458 (collecting cases).

In *Robinson*, for example, this Court held that a notice of appeal filed after the deadline in former Criminal Rule 37(a)(2) was untimely even though the late filing was due to "excusable neglect." 361 U.S. at 221–222, 230. This Court reached that conclusion because the language of the relevant rules precluded the possibility that equitable exceptions could apply. In particular, Criminal Rule 45(b) at the time allowed courts to extend most deadlines for "excusable neglect," however it provided that "the court may not enlarge . . . the period for taking an appeal." *Id.* at 223.[3] As

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[3] When *Robinson* was decided, Rule 45(b) provided as follows: "Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal." *Robinson*, 361 U.S. at 223.

*Robinson* held, that language is "quite plain and clear." *Id.* at 224.[4]

Similarly, in *Carlisle* this Court held that certain equitable exceptions could not apply where the petitioner had filed a motion for judgment of acquittal one day after the deadline in Criminal Rule 29(c). 517 U.S. at 418, 421. The district court had excused the untimely filing (and reversed the petitioner's conviction) because refusal to do so would result in a "grave injustice." *Id.* at 419. After the Sixth Circuit reversed, the petitioner argued that courts have the power to excuse an untimely filing when, *inter alia*, "there is a claim that the defendant was legally innocent" or "the motion was not timely filed because of attorney error." *Id.* This Court rejected that argument.

Noting that Criminal Rule 45(b) generally allowed extensions of deadlines for "good cause," but prohibited extensions of the deadline in Criminal Rule 29(c), this Court held that "[t]here is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion is accompanied by a claim of legal innocence . . . or was filed late because of attorney error." *Id.* at 421.

More recently, this Court affirmed the principle that *Robinson* and *Carlisle* stand for: that mandatory claim-

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[4] Although *Robinson* has been criticized for referring to the appeal deadline in that case as "mandatory and jurisdictional," this Court, as explained below, has expressly approved of and consistently cited *Robinson* for the rule that Nutraceutical relies on here: that courts "must observe the clear limits of [the federal rules] when they are properly invoked." *Eberhart*, 546 U.S. at 17.

processing rules in "emphatic form" "preclude equitable exceptions." *Kontrick*, 540 U.S. at 458. In *Kontrick*, this Court held that Federal Rules of Bankruptcy Procedure 4004(a) and (b) and 9006(b)(3), which contain deadlines for a creditor to object to a debtor's discharge, are mandatory claim-processing rules. *Id.* at 458. While *Kontrick* did not decide whether those rules are subject to equitable exceptions, it cited both *Robinson* and *Carlisle*, and expressly recognized that the issue of whether equitable exceptions could apply depends on "whether the time restrictions in th[e] rules are in such emphatic form as to preclude equitable exceptions." *Id.* at 458 (alteration in original) (citations omitted).

And one year later, in *Eberhart*, this Court applied *Robinson* and *Carlisle* again to hold that Criminal Rule 33(b)(2) is a mandatory claim-processing rule and therefore "unalterable on a party's application." 546 U.S. at 15 (quoting *Kontrick*, 540 U.S. at 456). In so holding, *Eberhart* adopted and clarified *Robinson's* reasoning.[5] This Court explained that "*Robinson* is correct not because the District Court lacked *subject-matter jurisdiction*, but because district courts *must observe* the clear limits of the Rules of Criminal Procedure when they are properly invoked." *Id.* at 17 (second emphasis added); *see also Hamer*, 138 S. Ct. at 21 n.11. This Court further recognized "the central point of the *Robinson* case–that when the Government

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[5] As in *Robinson* and *Carlisle*, the rule at issue in *Eberhart* was governed by Criminal Rule 45(b)'s express prohibition against extensions of time. *Eberhart*, 546 U.S. at 13 ("This deadline is rigid. The Rules provide that courts 'may not extend the time to take any action under [Rule 33], except as stated' in Rule 33 itself. Rule 45(b)(2)." (alterations in original)).

objected to a filing untimely under Rule 37, the court's duty to dismiss the appeal was *mandatory*." *Eberhart*, 546 U.S. at 18 (emphasis added); *see also id.* (approving *Carlisle's* holding that "a court may not grant a postverdict motion for judgment of acquittal that is untimely under Federal Rule of Criminal Procedure 29(c) *when the prosecutor objects*").[6]

These cases demonstrate that judges do not have discretion to alter or ignore plain language in the federal rules. *Bank of Nova Scotia*, 487 U.S. at 255 (explaining that the federal rules are "in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the [a federal rule's] mandate than they do to disregard constitutional or statutory provisions").

As *Robinson* explained:

> That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision.

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[6] This Court has reached the same conclusion in numerous other cases and held that the language used to define a procedural deadline precluded equitable exceptions. *See, e.g.*, *United States v. Brockamp*, 519 U.S. 347, 350–52 (1997) (holding that the "unusually emphatic" language, detail, and "the explicit listing of exceptions," demonstrate that other equitable exceptions are not available); *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 31 (1989).

361 U.S. at 229; *see also Carlisle*, 517 U.S. at 430 (explaining that courts may not "ignore the mandate" of the federal rules "in order to obtain 'optimal' policy results"); *Delta Airlines*, 383 F.3d at 1145 ("This court cannot disregard [the] plain meaning of the provisions found in [Appellate Rule] 26(b)(1)." (first alteration in original) (citation omitted)).

### B. THE FEDERAL RULES PRECLUDE EQUITABLE EXCEPTIONS TO THE RULE 23(f) DEADLINE

As discussed, this Court's long-standing precedent demonstrates that claim-processing rules can preclude equitable exceptions. The deadline to petition for permission to appeal under Rule 23(f) falls within this category. As in *Robinson* and *Carlisle*, the relevant federal rules—Rule 23(f) and Appellate Rules 5(a)(2), 26(b), and 2—use clear and "emphatic" language that preclude equitable exceptions. *Kontrick*, 540 U.S. at 458.

#### 1. Rule 23(f) and Appellate Rule 5(a)(2) are Strict and Mandatory

When interpreting a federal rule, this Court looks first and foremost to its text. *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989). Rule 23(f) states "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule *if* a petition for permission to appeal *is filed* with the circuit clerk *within 14 days* after the order is entered." Fed. R. Civ. P. 23(f) (emphasis added). The word "if" imposes a prerequisite to an interlocutory appeal—a petition filed "within 14 days after the order is entered." *Id.*

Appellate Rule 5(a)(2) reinforces this requirement.[7] That rule—titled "Petition for Permission to Appeal"—states: "the petition *must* be filed within the time specified by the statute or rule authorizing the appeal." Fed. R. App. P. 5(a)(2) (emphasis added). As this Court has recognized, the word "must" is "unmistakably mandatory [in] character." *Hewitt v. Helms*, 459 U.S. 460, 471 (1983), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *see also* Bryan Garner, *A Dictionary of Modern Legal Usage* 941 (2d ed. 1995) ("*Must* . . . means 'is required to.'").

### 2. Appellate Rule 26(b) Expressly Prohibits Extending the Rule 23(f) Deadline

If Rule 23(f) and Appellate Rule 5(a)(2) leave any doubt that courts lack discretion to extend the Rule 23(f) deadline, Appellate Rule 26(b) conclusively demonstrates that they cannot.[8] It states:

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[7] Appellate Rule 5 was amended effective December 1, 1998, in anticipation of the adoption of Rule 23(f). *See* Minutes of the Meeting of the Advisory Committee on Appellate Rules, April 15, 1996, at 11, *available at* http://www.uscourts.gov/sites/default/files/fr_import/AP0496.pdf.

[8] "[T]he appellate rules control the filing of a Rule 23(f) petition." *Delta Airlines*, 383 F.3d at 1145; *see also In re Veneman*, 309 F.3d 789, 793 (D.C. Cir. 2002) ("[W]e agree that the Federal Rules of Appellate Procedure govern the filing of Rule 23(f) petitions."); *Beck v. Boeing Co.*, 320 F.3d 1021, 1023 (9th Cir. 2003); *Lienhart v. Dryvit Sys. Inc.*, 255 F.3d 138, 142, n.1 (4th Cir. 2001); *see also supra* note 7 (explaining that Appellate Rule 5 was amended to apply to Rule 23(f) petitions).

> (b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. ***But the court may not extend the time to file***:
>
> > (1) a notice of appeal (except as authorized in Rule 4) or ***a petition for permission to appeal***.

Fed. R. App. P. 26(b)(1) (emphasis added).

Notably, Appellate Rule 26(b) is nearly identical to Criminal Rule 45(b), which this Court analyzed in *Robinson* and *Carlisle* and concluded was unsusceptible to equitable exceptions. At the time, Criminal Rule 45(b) provided that courts could extend most time periods "if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal." *Robinson*, 361 U.S. at 223 (quoting Fed. R. Crim. P. 45(b)). Because the language of Criminal Rule 45(b) was "quite plain and clear," the *Robinson* court held that it precluded an extension for "excusable neglect," 361 U.S. at 221–222, 224, and the *Carlisle* court held that it precluded exceptions for "attorney error" or where "the defendant was legally innocent," 517 U.S. at 419; *see also Eberhart*, 546 U.S. at 13 ("This deadline is rigid. The Rules provide that courts may not extend the time to take any action under [Rule 33], except as stated in Rule 33 itself." (alteration in original) (citations omitted)).

The parallels here are compelling. Like Criminal Rule 45(b), Appellate Rule 26(b) provides that "[f]or

good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court *may not extend the time to file . . . a petition for permission to appeal*." Fed. R. App. P. 26(b) (emphasis added). In fact, both Appellate Rule 26(b) and Criminal Rule 45(b) are patterned on similar language in Federal Rule of Civil Procedure 6(b). *Kontrick*, 540 U.S. at 456 n.10.[9] Simply put, if the language in Criminal Rule 45(b) precluded equitable exceptions in *Robinson* and *Carlisle*, the same must be true of Appellate Rule 26(b).[10]

Every other Court of Appeals to consider this issue has reached the same conclusion and applied Appellate Rule 26(b) to reject untimely Rule 23(f) petitions. *See Eastman v. First Data Corp.*, 736 F.3d 675, 677 (3d Cir. 2013) (rejecting Rule 23(f) petition that was filed late as a result of counsel's mistake because Appellate Rule 26(b)(1) "clearly states that this Court cannot extend the time for filing a petition for permission to appeal");

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[9] Rule 6(b) expresses the "view that there should be a definite point where it can be said a judgment is final" and "the right method" is "to list in Rule 6(b) the various other rules whose time limits *may not be set aside*." Fed. R. Civ. P. 6 advisory committee's note to 1946 amendment (emphasis added). Following its adoption, federal courts consistently defined the limits in Rule 6(b) as jurisdictional and therefore non-extendable. *See Robinson*, 361 U.S. at 229. Appellate Rule 26(b) was drafted against this backdrop and with the same intent. *See id.* (explaining that the drafters of Criminal Rule 45(b) must have been aware of Rule 6(b) "and of the judicial construction it had received").

[10] Indeed, this Court previously referred to Appellate Rule 26(b) as creating a "mandatory and jurisdictional" deadline. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988).

*Delta Airlines*, 383 F.3d at 1145 (rejecting Rule 23(f) petition filed late as a result of attorney error, holding "[t]he Federal Rules of Appellate Procedure specifically foreclose appellate courts from granting an extension of time to file a petition for permission to appeal"); *Fleischman*, 639 F.3d at 31 ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal.").

The Third Circuit applied Appellate Rule 26(b) to reject an untimely Rule 23(f) petition in a situation that closely resembles the facts in this case. The petitioners in *Gutierrez* did not file a Rule 23(f) petition or a motion for reconsideration before the Rule 23(f) deadline expired. 523 F.3d at 191. Instead, they requested, by letter, an extension of time to file a motion for reconsideration before the Rule 23(f) deadline had expired, the district court granted the request, and the petitioners filed a Rule 23(f) petition within ten days of the order denying their motion for reconsideration. *Id.* Unlike the Ninth Circuit, the Third Circuit rejected the petitioners' argument that the district court's scheduling order could extend the time to file a Rule 23(f) petition. *Id.* at 194. Citing Appellate Rule 26(b), the Third Circuit held that "[a] district court may not . . . enlarge the time to file a Rule 23(f) petition." *Id.* at 193 n.5; *see also id.* at 194 n.6.

### 3. Appellate Rule 2 Reinforces the Prohibition Against Extending the Rule 23(f) Deadline

While the prohibition in Appellate Rule 26(b) is clear and well-established, Appellate Rule 2 provides even more evidence that the Rule 23(f) deadline is non-extendable. Appellate Rule 2 states:

> On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, *except as otherwise provided in Rule 26(b).*

Fed. R. App. P. 2 (emphasis added).

Appellate Rule 2 "contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result," however that exception cannot apply to Appellate Rule 26(b) because Appellate Rule 26(b) "prohibits a court of appeals from extending the time for taking appeal or seeking review." Fed. R. App. P. 2 advisory committee's note to 1967 adoption. Appellate Rule 2 therefore further demonstrates that Appellate Rule 26(b) precludes equitable exceptions to the Rule 23(f) deadline.

This Court has applied Appellate Rule 2 to hold that Appellate Rule 26(b) is non-extendable. In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988), the question presented was whether courts could excuse a notice of appeal that did not identify all appellants in accordance with Appellate Rule 3(c). After explaining that Appellate Rule 2 and Appellate Rule 26(b) "forbid[] a court to 'enlarge' the time limits for filing a notice of appeal," this Court held that no exceptions could apply because "[p]ermitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal." *Id.* at 315; *see also Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1231 (11th Cir. 2007) (holding that

Appellate Rule 2 and 26(b) "explicitly forbid us from suspending, even for good cause, the time requirements" for filing a petition for permission to appeal).

In sum, multiple federal rules explicitly prohibit courts from extending the Rule 23(f) deadline. That prohibition applies even in the face of "good cause," Fed. R. App. P. 26(b), or "manifest injustice," Fed. R. App. P. 2 advisory committee's note to 1967 adoption. It is difficult to imagine more "emphatic" language precluding equitable exceptions. *See Kontrick*, 540 U.S. at 458; *see also Robinson*, 361 U.S. at 224 (enforcing deadline despite excusable neglect because the rule's language was "quite plain and clear"); *Carlisle*, 517 U.S. at 421 (same).

Nevertheless, the Ninth Circuit impermissibly ignored the plain language of the federal rules and adopted equitable exceptions to the Rule 23(f) deadline that did—and in future cases will—extend the time to petition for permission to appeal. That error warrants correction by this Court.

### C. THE NINTH CIRCUIT'S DECISION CONTRAVENES THE PURPOSE BEHIND THE RULE 23(f) DEADLINE

The Ninth Circuit's decision also contravenes the express purpose of the Rule 23(f) deadline: to reduce the disruption and delay caused by interlocutory appeals. Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment.

It is well-established that deadlines governing the time for filing an appeal should be strictly enforced. In the past, this Court categorically defined appeal

deadlines as "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (citation omitted); *see also Bowles*, 551 U.S. at 209 n.2 ("[T]ime limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century.").

The need for a mandatory, inflexible deadline is even more pronounced in the context of interlocutory appeals like those authorized by Rule 23(f). "[I]nterlocutory appeals are generally disfavored as disruptive, timeconsuming, and expensive for both the parties and the courts, and the more so in a complex class action where the district court may reconsider and modify the class as the case progresses." *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002) (citations omitted).

For this reason, appellate courts generally only review final judgments. *See* 28 U.S.C. § 1291. The final judgment rule serves several important interests:

> It helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice.

*Flanagan v. United States*, 465 U.S. 259, 263–64 (1984); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (stating that interlocutory appeals "undermine[] efficient judicial administration and encroach[] upon the prerogatives of district court

judges, who play a special role in managing ongoing litigation") (citations omitted); *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017) (stating that the final judgment rule "minimizes the harassment and delay that would result from repeated interlocutory appeals").

Although Rule 23(f) creates an exception to the final judgment rule, that exception is intentionally narrow. To address and reduce the problems created by interlocutory appeals, Rule 23(f) created a "deliberately small" 14-day filing window. *Gary*, 188 F.3d at 893. As the advisory committee notes explain, "the [14]-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment[11]; *see also Fleischman*, 639 F.3d at 31 (recognizing "Rule 23(f)'s aim of providing an opportunity for interlocutory appeal, but confining that opportunity within narrow limits, so as to avoid disruption and delay to the proceedings below"); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) ("Although Rule 23(f) expands opportunities to appeal certification decisions,

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[11] The advisory committee minutes demonstrate that this limit was important to the drafters and thoroughly discussed. *See* Minutes of the Advisory Committee on Civil Rules, November 9 and 10, 1995 at 3–4, *available at* http://www.uscourts.gov/sites/default/files/fr_import/min-cv11.pdf ("The limits built into the draft were noted repeatedly throughout the discussion. Application for permission to appeal must be made within 10 days of the order granting or denying certification. . . . [T]he danger of delay is reduced not only by the draft requirement that permission to appeal be sought within 10 days, but also by the prospect that the courts of appeals generally will act quickly, likely within 30 days or so, in deciding whether to grant permission.").

the drafters intended interlocutory appeal to be the exception rather than the rule.").

For this reason, every other Court of Appeals to consider this issue has recognized that the Rule 23(f) deadline is "strict and mandatory." *See, e.g.*, *Gutierrez*, 523 F.3d at 199 ("We stress that Rule 23(f)'s time limit for filing a motion to reconsider is a strict and mandatory time period, for Rule 23(f) creates a (brief) opportunity for expedited review." (citation omitted)); *Gary*, 188 F.3d at 893 ("[T]o ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of review is deliberately small."); *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1290 (11th Cir. 2007) ("[T]he . . . deadline provides a single window of opportunity to seek interlocutory review, and that window closes quickly to promote judicial economy."); *Fleischman*, 639 F.3d at 31 ("It is well-established that Rule 23(f)'s 14 day filing requirement is a rigid and inflexible restriction." (citation omitted)); *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014) ("The 'rigid and inflexible' nature of this deadline is 'well-established.'" (citation omitted)); *In re DC Water & Sewer Auth.*, 561 F.3d 494, 495 (D.C. Cir. 2009).

Splitting from its sister circuits, the Ninth Circuit disregarded the concerns noted above and instead adopted broad equitable exceptions. The Ninth Circuit based its holding on the assumption that interlocutory appeals under Rule 23(f) are not generally disruptive and slow. *Lambert*, 870 F. 3d at 1180 ("The premise that Rule 23(f) petitions are disruptive and slow is not

universally true and we decline to adopt any hard and fast rule on the basis of such an idea.").

That assumption is directly contrary to the express purpose of Rule 23(f), *see* Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment, and the unanimous authority discussed above—both from this Court and other Courts of Appeals—that recognizes the delay and disruption caused by interlocutory appeals. Indeed, even other decisions from the Ninth Circuit itself recognize that "[i]nterlocutory appeals are generally disfavored because they are disruptive, time-consuming, and expensive." *Chamberlan*, 402 F.3d at 959 (citation omitted).

The Ninth Circuit's assumption is also demonstrably false. The only reason a court would apply equitable exceptions to the Rule 23(f) deadline is to allow an appeal that was not initiated on time. It is beyond dispute that applying equitable exceptions to the Rule 23(f) deadline will allow late appeals and further delay the appellate process and district court proceedings.

In fact, delay is even more likely given the broad and vague equitable standards the Ninth Circuit adopted. Specifically, the Ninth Circuit held that a litigant can toll the Rule 23(f) deadline by simply "conveying an intent" to file a motion for reconsideration. *Lambert*, 870 F.3d at 1178. Under that lenient and vague rule, litigants have little incentive to comply with the Rule 23(f) deadline or diligently pursue petitions for permission to appeal within 14 days of a district court's order. Instead, litigants can preserve their right to appeal by simply writing a letter or orally informing the district court

that they *intend* to file a motion for reconsideration. District courts may see an influx of such communications, which could add months to the already significant delays associated with Rule 23(f) petitions.

The specific reasons the Ninth Circuit gave for its decision do not compel a different conclusion:

*First*, the court noted that Rule 23(f) petitions do not automatically stay district court proceedings. While that may be true, it is not a reason to create further delay. *See Blair v. Equifax Check Servs.*, 181 F.3d 832, 835 (7th Cir. 1999) (noting that the lack of an automatic stay provision demonstrates that "Rule 23(f) is drafted to avoid delay").

Moreover, although a stay is not automatic, Rule 23(f) allows either the district court or the Court of Appeals to enter a stay of the proceedings in the district court pending the appeal. *See* Fed. R. Civ. P. 23(f). It is unlikely that the district courts—which have increasingly heavy dockets—will continue to litigate a case and potentially waste judicial resources while an appeal is pending. In this case, the District Court entered a stay that has lasted nearly three years. JA9.

Stays are particularly likely in this context because an order on class certification can significantly affect the parties' economic incentives. Where, as here, a district court has decertified the class, the class plaintiffs must proceed on an individual basis. Under these circumstances, class plaintiffs have little economic incentive to proceed and will likely request a stay. The same is true for class-action defendants. If

a class is certified, many defendants will prefer to file an appeal and seek a stay rather than risk liability on a class-wide basis.

*Second*, the Ninth Circuit reasoned that "Rule 23(f) petitions may lengthen litigation. But so do motions for reconsideration of a class action decertification decision when no 23(f) petition is filed, which every circuit to consider the question has treated as valid grounds for equitable tolling." *Lambert*, 870 F.3d at 1181.

That is irrelevant. Even assuming a motion for reconsideration filed before the Rule 23(f) deadline can restart the time to file a Rule 23(f) petition, *see infra* section IV, it does not follow that courts should further extend the deadline—as the Ninth Circuit did—by applying equitable exceptions to motions for reconsideration filed *after* 14 days.

*Third*, the Ninth Circuit stated that "Rule 23(f) petitions do not uniquely disrupt or inject uncertainty into the litigation." *Lambert*, 870 F.3d at 1181. But as discussed above, it is well-recognized that interlocutory appeals do cause uncertainty. The mere possibility of an appellate court reversing a decision on class certification will cause uncertainty as to the status of the case during district court proceedings.

More importantly, the Ninth Circuit's decision has created considerable uncertainty as to how the Rule 23(f) deadline applies and the timeliness of future petitions. The Ninth Circuit replaced a simple, bright-line rule with a vague and impractical standard. Courts now must consider "whether a litigant took some other action similar to filing a motion for reconsideration within the fourteen-day deadline, such

as a letter or verbal representation conveying an intent to seek reconsideration and providing the basis for such action." *Lambert*, 870 F. 3d at 1179. That subjective standard is ambiguous, difficult to apply in practice, and unnecessary.

It will also create even more uncertainty in the law. As this Court is aware, equitable tolling issues are highly fact-dependent, and under the Ninth Circuit's standard, courts will be forced to decide whether a verbal representation at a status conference, a letter, or a call to the clerk's office, was sufficient to toll the Rule 23(f) deadline. In short, this Court should not "adopt a construction of Rule 23(f) that would regularly require mental gymnastics just for the purpose of giving litigants a second bite at the interlocutory-appellate-review apple." *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006).

The Ninth Circuit's reliance on the District Court's briefing schedule will also require courts to consider whether a petitioner has complied with a district court's schedule, which defeats the very purpose of having a uniform federal deadline. For example, local rules governing motions for reconsideration vary across the district courts. The Central District of California has no deadline, while the Southern District of California requires motions for reconsideration to be filed within 28 days. *Compare* C.D. Cal. L.R. 7–18, *with* S.D. Cal. Civil L.R. 7.1(i)(2). *See also* N.D. Cal. Civil L.R. 7–9(a) (requiring leave of court); D. Ariz. LRCiv 7.2(g)(2) (14-day deadline). Under the Ninth Circuit's decision, courts must now also take the local rules (and their differences) into account.

For these reasons, the Ninth Circuit's decision violates Rule 23(f)'s express purpose by causing even further delay, disruption, uncertainty, and waste of resources. It is also important to note that the Ninth Circuit's broad equitable exceptions apply to all non-jurisdictional deadlines. *Lambert*, 870 F.3d at 1177. Accordingly, the problems created by the Ninth Circuit's decision in the Rule 23(f) context may well spread to other areas.

### D. THERE IS NO NEED FOR EQUITABLE EXCEPTIONS TO THE RULE 23(f) DEADLINE

Historically, courts have justified creating equitable exceptions to ensure fairness to litigants who—through no fault of their own—would otherwise have no opportunity to obtain judicial relief. *Rudin v. Myles*, 781 F.3d 1043, 1055 (9th Cir. 2015) ("[T]he purpose of equitable tolling is to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having [her] day in court." (alteration in original) (citation omitted)); *see also Holland v. Florida*, 560 U.S. 631, 650 (2010).

Consider, for example, a statute of limitations. Failure to comply with a limitations deadline may completely bar a party from obtaining any judicial relief. Accordingly, courts have traditionally applied equitable tolling to limitations periods if the relevant statutory language permits. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990); *Holland*, 560 U.S. at 645–46.

These justifications for creating equitable exceptions simply do not apply to the Rule 23(f)

deadline. Rigid application of the Rule 23(f) deadline does not create the same harsh consequences because a Rule 23(f) petition is not the only opportunity to obtain appellate review of an order granting or denying class certification. Even when no Rule 23(f) petition has been filed, a party is fully entitled to appeal the district court's certification order after final judgment. *See* 28 U.S.C. § 1291; *Jenkins*, 491 F.3d at 1292 ("Our decision does not leave the employees without an avenue for relief. They can appeal the denial of class certification following the entry of a final judgment."). The Rule 23(f) deadline is therefore fundamentally different than other contexts where equitable exceptions have been applied.

Courts have also applied equitable exceptions to alleviate the harsh application of the law when a litigant is unsuspecting or unsophisticated. *See Sebelius v. Auburn Regional Med. Ctr.*, 568 U.S. 145, 160 (2013) (stating that equitable tolling has been applied to statutory schemes "in which laymen, unassisted by trained lawyers, initiate the process" (citations omitted)).

This justification also does not apply to the Rule 23(f) context. Parties to a class action are typically represented by competent counsel who are familiar with the relevant rules and deadlines. Indeed, class counsel must be appointed by the court only after a diligent scrutiny of their adequacy and competency. *See* Fed. R. Civ. P. 23(g)(1). Thus, the concerns that have motivated courts to adopt equitable exceptions to protect unsuspecting or unsophisticated litigants are not applicable here. *See Hallstrom*, 493 U.S. at 28 (rejecting equitable exceptions, in part, because the

class of suits at issue are "generally filed by trained lawyers who are presumed to be aware of statutory requirements"); *see also Sebelius*, 568 U.S. at 160 (rejecting equitable exceptions, in part, because the appeals at issue were initiated by "sophisticated" parties "assisted by legal counsel" who had "notice of the [relevant] regulations").

Relatedly, the Rule 23(f) deadline is not a uniquely difficult deadline to satisfy. Filing a petition for permission to appeal is not a complicated or momentous event like the initiation of a lawsuit; rather, the parties are already actively engaged in litigation and are closely monitoring the district court's decision on class certification.

The scope of appellate review on a Rule 23(f) petition is also narrow: did the district court abuse its discretion in granting or denying class certification? *Lambert*, 870 F.3d at 1176. When the district court's order is entered, the petitioner has the information he needs to appeal, including the evidence and arguments presented to the district court and the district court's order. There is no reason why competent counsel and parties cannot marshal their arguments and petition for permission to appeal within 14 days of the district court's order.

Even if this Court were to disagree and conclude that equitable exceptions to the Rule 23(f) deadline are necessary, "that policy question . . . must be resolved through the rule-making process and not by judicial decision." *Robinson*, 361 U.S. at 229; *see also Carlisle*, 517 U.S. at 430 (explaining that courts may not "ignore the mandate" of the federal rules "in order to obtain 'optimal' policy results").

## III. THE DECISION BELOW REQUIRES REVERSAL EVEN IF EQUITABLE EXCEPTIONS COULD APPLY

Even if equitable exceptions could apply to the Rule 23(f) deadline, the exceptions the Ninth Circuit adopted are overly broad and inconsistent with the governing standards this Court has established. Critically, equitable exceptions apply only where an external obstacle outside the litigant's control caused the untimeliness. Here, nothing prevented or misled Lambert from filing a timely Rule 23(f) petition.

### A. EQUITABLE EXCEPTIONS APPLY ONLY WHERE AN EXTERNAL OBSTACLE CAUSED THE UNTIMELINESS

As is relevant here, this Court has applied two equitable exceptions to excuse untimely filings: (1) equitable tolling and; (2) the doctrine of unique circumstances. Each exception requires that an external obstacle caused the litigant to miss the relevant deadline.

#### 1. Equitable Tolling

Equitable tolling applies to certain statutes of limitations, including the deadline in the federal habeas corpus statute. *See Holland*, 560 U.S. at 634. But "a petitioner is entitled to equitable tolling only if he shows . . . that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* at 649 (citation omitted); *see also Menominee Indian Tribe*, 136 S. Ct. at 756 ("We therefore reaffirm that the second prong of the equitable tolling test is met only where the circumstances that caused a litigant's

delay are both extraordinary and beyond its control."); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Lawrence v. Florida*, 549 U.S. 327, 336 (2007); *Cal. Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050 (2017).

Accordingly, this Court has refused to apply equitable tolling where no extraordinary circumstance prevented a timely filing. In *Menominee Indian Tribe*, for example, equitable tolling did not apply where the petitioners had mistakenly relied on a district court's order in another case. 136 S. Ct. at 757 ("This mistake was fundamentally no different from 'a garden variety claim of excusable neglect.'" (citation omitted)). And in *Lawrence*, this Court rejected an argument that a mistake made by an incarcerated petitioner's counsel could give rise to equitable tolling. 549 U.S. at 336 ("Attorney miscalculation is simply not sufficient to warrant equitable tolling.").

### 2. The Doctrine of Unique Circumstances

The doctrine of unique circumstances requires a litigant to satisfy an even higher burden.[12] It applies only if—unlike here—the party invoking it has relied on a "specific assurance" from a court that an appeal can be initiated at a later date. *Osterneck*, 489 U.S. at 179; *see also Carlisle*, 517 U.S. at 435 (Ginsburg, J., concurring) ("That exception covers cases in which the

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[12] *Bowles* held that the doctrine of unique circumstances does not apply to jurisdictional rules. 551 U.S. at 213. *Bowles* explained that the doctrine is rarely applied and has been in a "40-year slumber." *Id.* 214. Even assuming *arguendo* that the doctrine survives and could apply to claim-processing rules, the Ninth Circuit's adoption of far broader standards must be reversed.

trial judge has misled a party who could have—and probably would have—taken timely action had the trial judge conveyed correct, rather than incorrect, information.").

In *Thompson v. Immigration & Naturalization Service*, for example, the petitioner filed an untimely motion for a new trial, yet the district court mistakenly declared that the motion was made "in ample time." 375 U.S. 384, 385 (1964), *overruled generally by Bowles*, 551 U.S. at 214. As a result, the petitioner waited until his motion for a new trial was denied before he filed a notice of appeal. In that case, this Court held that the doctrine of unique circumstances applied since the petitioner, in reliance on the district court's statement and former Federal Rule of Civil Procedure 73,[13] believed that the deadline to file a notice of appeal would not run until his motion for a new trial was denied. *Id.* at 385–86

By contrast, this Court held in *Osterneck* that the doctrine of unique circumstances did not apply where no court had "ever affirmatively represented to the Osternecks that their appeal was timely filed, nor did the Osternecks ever seek such assurance from [a] court." 489 U.S. at 178–79 (citation omitted). This Court distinguished *Thompson*, holding that the doctrine "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific

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[13] In pertinent part, Federal Rule of Civil Procedure 73 provided that the time to appeal would not run until "the entry of any of the following orders made upon a timely motion under such rules: . . . denying a motion for a new trial under Rule 59." *Thompson*, 375 U.S. at 385.

assurance by a judicial officer that this act has been properly done." *Id.*; *see also Carlisle*, 517 U.S. at 435 (Ginsburg, J., concurring) (explaining that the doctrine of unique circumstances did not apply because "Carlisle's counsel was not misled by any trial court statement or action; rather, he neglected to follow plain instructions").

### B. THE NINTH CIRCUIT ADOPTED OVERLY BROAD AND IMPROPER EQUITABLE EXCEPTIONS

Here, the Ninth Circuit adopted a standard much broader than any equitable exception this Court has recognized. Pursuant to the Ninth Circuit's decision, courts must "look to equitable factors such as whether the litigant 'pursued his rights diligently,'" "whether external circumstances, such as a deadline imposed by the district court, affected the litigant," and "whether [the] litigant took some other action similar to filing a motion for reconsideration within the 14-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration and providing the basis for such action." *Lambert*, 870 F.3d at 1178 (footnote and citation omitted).

Absent from the Ninth Circuit's standard is any requirement that "the circumstances that caused a litigant's delay are both extraordinary and beyond its control." *Menominee Indian Tribe*, 136 S. Ct. at 756; *see also Holland*, 560 U.S. at 649. Nor is there any requirement in the Ninth Circuit's standard that a party rely on a "specific assurance" from a court that they can initiate an appeal at a later date. *Osterneck*, 489 U.S. at 179. As a result, the Ninth Circuit's standard will improperly provide relief to parties who

were not misled or prevented from making a timely filing, but instead failed to follow applicable rules.

That is precisely what happened in this case. No extraordinary circumstance stood in Lambert's way of filing a timely petition. Lambert could have easily filed a Rule 23(f) petition before the 14-day deadline had expired. Instead, he chose to pursue a motion for reconsideration, which he did not file until after the Rule 23(f) deadline had expired.

It is also beyond dispute that the District Court never gave Lambert a "specific assurance" that he could file a Rule 23(f) petition for permission to appeal at a later date. *Osterneck*, 489 U.S. at 179. In fact, the District Court had no idea that Lambert would file an interlocutory appeal. At the March 2, 2015, status conference, Lambert only requested permission to file a "renewed motion for class certification." Pet. App. 71. Lambert never mentioned an interlocutory appeal or the Rule 23(f) deadline at that status conference or at any other time before he filed his appeal. *See id.* at 68–77. In fact, there is no evidence in the record showing that Lambert or his counsel even considered filing an appeal before his motion for reconsideration was denied.

The Third Circuit in *Gutierrez* refused to apply equitable exceptions under facts far more favorable to the petitioners. *Gutierrez*, 523 F.3d at 198–99. There, the petitioners requested an extension of time to file a motion for reconsideration by letter. That letter also expressed petitioners' (mis)understanding that the extension "would not prejudice their ability to seek review of the denial of class certification." *Id.* at 198. Although the district court granted the extension, the

Third Circuit held that the doctrine of unique circumstances did not apply because the "District Court made no affirmative statements about the effect of the extension of time on Petitioners' ability to appeal to this Court." *Id.* at 199.

The same is true here. Lambert was not misled or prevented from filing a timely Rule 23(f) petition. He simply failed to follow the applicable rules.

Lambert's actions do not even constitute "excusable neglect," which this Court has held is insufficient to invoke equitable exceptions. *See Irwin*, 498 U.S. at 96 ("[T]he principles of equitable tolling described above do not extend to what is at best a garden variety claim of excusable neglect."); *see also Menominee Indian Tribe*, 136 S. Ct. at 757; *Osterneck*, 489 U.S. at 179; *Eastman*, 736 F.3d at 677 ("Counsel's mistake or ignorance of the rules . . . is not a reason to accept an untimely Rule 23(f) petition.").

## IV. LAMBERT'S MOTION FOR RECONSIDERATION DID NOT POSTPONE OR RESET THE RULE 23(f) DEADLINE

While this Court has held that a motion for reconsideration can postpone a deadline to appeal, that rule only applies if the motion is *timely* filed. *United States v. Dieter*, 429 U.S. 6, 8 (1976) ("[T]he consistent practice in civil and criminal cases alike has been to treat *timely* petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending." (emphasis added)).

In this context, a motion for reconsideration is "timely" only if it is filed *before* the deadline to appeal expires. *Healy*, 376 U.S. at 77–78 ("[A] timely petition

for rehearing by the Government filed *within the permissible time for appeal* renders the judgment not final for purposes of appeal until the Court disposes of the petition." (emphasis added)); *United States v. Ibarra*, 502 U.S. 1, 5 (1991) (motion filed before 30-day appeal deadline in Appellate Rule 4(b) had expired); *Dieter*, 429 U.S. at 7 (same); *see also United States v. Lefler*, 880 F.2d 233, 234 (9th Cir. 1989) (explaining that *Dieter* and *Healy* require a motion for reconsideration to be filed before the time to appeal expires).

Following this Court's reasoning, every Court of Appeals to consider the effect of a motion for reconsideration on the Rule 23(f) deadline, including the Ninth Circuit below, has held that only a *timely* motion for reconsideration—*i.e.*, one filed within the 14-day window in Rule 23(f)—can toll the deadline. *Blair*, 181 F.3d at 837 ("[A] motion for reconsideration tolls the time for appeal, provided that the motion is made within the time for appeal."); *Gutierrez*, 523 F.3d at 193 ("We stress that, for the purpose of tolling the time within which to file a Rule 23(f) petition, a 'timely' motion to reconsider is one that is filed within the [14]-day period set forth in Rule 23(f)."); *Gary*, 188 F.3d at 892 ("[I]f the request for reconsideration is filed more than [14] days after the order . . . then appeal must wait until the final judgment."); *McNamara*, 410 F.3d at 281; *Nucor Corp.*, 760 F.3d at 343; *Carpenter*, 456 F.3d at 1191; *Fleischman*, 639 F.3d at 31; *Shin v. Cobb Cty. Bd. of Educ.*, 248 F.3d 1061, 1064 (11th Cir. 2001); *Lambert*, 870 F.3d at 1178.

Here, there is no dispute that Lambert's motion was filed *after* the Rule 23(f) deadline had expired.

Specifically, it is undisputed that Lambert did not file a motion for reconsideration until March 12, 2015, even though the 14-day deadline under Rule 23(f) expired on March 6. The motion for reconsideration was therefore untimely, and, under the law discussed above, could not have tolled or restarted the Rule 23(f) deadline.

## CONCLUSION

The Ninth Circuit's decision to excuse Lambert's untimely Rule 23(f) petition and apply equitable exceptions to all claim-processing rules is inconsistent with this Court's precedent, violates the federal rules' prohibition against extending the time to file a Rule 23(f) petition, and contravenes the purpose behind the Rule 23(f) deadline. This Court should reverse.

Respectfully submitted,

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